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Supreme Court of the United States

OCTOBER TERM, 1959

No. 882

MAX WINZELBERG, an Individual,
Petitioner,

v.

R. K. BAKING CORP., and BAKERY & PASTRY DRIVERS AND HELPERS UNION, LOCAL NO. 802, INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA,
Respondents,

and

NATIONAL LABOR RELATIONS BOARD,
Respondent.

REPLY BRIEF OF PETITIONER TO THREE OPPOSITION BRIEFS OF RESPONDENTS

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REPLY BRIEF OF PETITIONER TO THREE OPPOSITION BRIEFS OF RESPONDENTS

The main, if not the only, objection voiced by the opposing briefs is that Petitioner lacks standing in this Court. This reply effectively scotches this objection.

I. The Statute and Board Regulations Analyzed

A. The Basic Statute Authorizes This Petition

There are a few sections of the amended Wagner Act which bear upon Petitioner's claim to standing:

1) There is no question but that Petitioner is a "person aggrieved" factually and statutorily. The facts, so disclose and the basic Statute, in §10(b), *proviso*, so denominates the Petitioner.

2) In §10(f) of said Act "Any person aggrieved by a final order of the Board" may seek review by filing a written petition with a Court of Appeals, the clerk of which then transmits a copy to the Board, "and thereupon the aggrieved party shall file" a certified record.

3) Section 10(l), immediately after the proviso, states: "Upon filing of any such petition the courts shall cause notice thereof to be served upon any person involved in the charge and such person, including the charging party, shall be given an opportunity to appear by counsel and present any relevant testimony . . . ."

4) Section 2 of the basic Act has twelve subdivisions which define various terms, e. g., person, employee, but nowhere is "party" defined.

B. The Labor Board's "Rules and Regulations" Support This Petition

The Labor Board's Rules and Regulations, Series 8, were issued on November 4, 1959, published November 7th (24 F. R. 9095), and became effective November 13th. Sub-Parts A and B are here pertinent. They contain the following sections:

1) Section 102.8 defines "Party," which includes, "without limitation, any person filing a charge or petition under the act . . . ."

2) Section 102.14, places the onus for the timely and proper service of a copy of the charge upon "the charging party [who] shall be responsible" therefor.

3) Section 102.15 informs that the regional director shall thereafter "issue and cause to be served upon all the other parties a formal complaint" if it appears to him such should be issued.

4) Section 102.19 requires the regional director to advise "the parties" if he declines to issue a complaint, whereupon "The person making the charge may obtain a review of such action" "of the general counsel in Washington."

5) Section 102.27. Where a trial examiner, before filing his intermediate report, grants a motion to dismiss a complaint in its entirety, "any party may obtain a review" of the Board in Washington.

6) Numerous other sections mention "any party," e. g., §§102.37, 102.38, 102.42, 102.46, or "all interested parties," §102.51, whereas "the respondent" is separately particularized, e. g., §§102.8, 102.20, 102.21, 102.23, 102.45, 102.52, 102.54, 102.55.

Subpart I of the Rules and Regulations, entitled "Service and Filing of Papers," contains §102.112: "Service of papers by a party on other parties shall be made by registered mail" etc. (See also §102.113[b].)

Subpart M, in its only section, §102.121, states that "The Rules and Regulations in this part shall be liberally construed to effectuate the purposes and provisions of the act."

C. Analysis of and Conclusions Based Upon the Statute and Regulations

We can admit, at the outset, that ambiguity exists in both the statute and the Regulations concerning the exact initial and continuing status of a charging party. Still, if clarity is lacking, a petitioner such as this should not be penalized. The statutory procedural scheme is not violated when the very party for whom a back pay award is made finds himself "damaged," "injured," and "aggrieved" by a reversal of the Court of Appeals and now desires a review. Could Winzelberg, the Petitioner herein, have sought judicial redress from the Board's order? Could he claim he was damaged, injured, or aggrieved thereby? Did not the Board recognize and treat him as a party? What could Winzelberg do other than what he did do? Respondents impliedly say he should have intervened. But why? Was he not already a party? Would not the Court of Appeals have accepted and filed a brief of his in support of his back pay award? Why commit a useless act for no ultimate reason?

Even more ridiculous would be a statutory or Board actual and express procedural requirement for intervention. Follow it out practically: the Board has 90 days within which to petition for certiorari from a final determination of a Court of Appeals; at any time within this period any "party" or "person" involved in any way in these proceedings, and whose interest is as plain as is Wingelberg's herein, can move in the Court of Appeals to intervene for the express purpose of taking certiorari; any such motion would have to be granted procedurally, factually, discretionarily,

and perhaps constitutionally; thus the mere filing of a short motion would effectuate what Congress and the Board are alleged by these Respondents not to have permitted directly.

II. The Cases Analyzed

A. Those Cited by Respondents

All three Respondents have cited and relied upon *Amalgamated Utility Workers* v. *Consolidated Edison Co. of New York,* 309 U. S. 261, and all three Respondents have quoted from it to the effect that "The Act gives no authority for any proceeding by a private person . . . to secure enforcement of the Board's order. . . ." Agreed. Thus if the Labor Board had made an award herein to Winzelberg and then had done nothing, Winzelberg could not himself have petitioned the Court of Appeals for an enforcement order. We do not quarrel with the reason for or the law itself.

However, how does this square with the situation here presented? The Board has already sought enforcement and the Court of Appeals has agreed so to do in part; it is in the part which it refuses to enforce that, on the law involved, Wingelberg desires review herein. He does not seek enforcement in the immediate sense envisaged by the *Amalgamated Utility* case; but none, including Respondents, would argue that Winzelberg could not have supported the Board's petition for enforcement, become a "party" via intervention or otherwise, and then have had "standing" for this petition. So it is not the concept of initial enforcement which is here involved; rather, it

is merely a procedural question of whether Winzelberg is to be recognized as being able to petition herein. The *Amalgamated Utility* case involves a substantive element of standing to sue, whereas now all Respondents (they even argue it) apparently concede this but claim that no procedural basis can be found.

B. Other Cases

This Court, in *Republic Steel Corp.* v. *N. L. R. B.*, 311 U. S. 7, at page 11, spoke of the power of the Labor Board to make remedial orders, and then concluded: "All these measures relate to the protection of the employees and the redress of their grievances, not to the redress of any supposed public injury after the employees have been made secure in their right of collective bargaining and have been made whole." And, although dissenting, Messrs. Justices Black and Douglas felt that "The central policy of the Act is protection to employees from employer" unfair labor practices (at p. 14).

In Point I, subd. C, *supra*, mention was made of the substantive-procedural distinction relating to standing, and the suggestion was made that the Respondents herein have fallen into a trap of their own making when they cited and relied upon the *Amalgamated Utility* case, *supra*. For example, in *City of Chicago* v. *Atchison, Topeka & Santa Fe Railway Company*, 357 U. S. 77, Railroad Transfer Service and the Railroads asked for a declaratory judgment on the inapplicability or invalidity of a City ordinance. "Parmalee was permitted to intervene as a defendant" (at p. 81). And yet, after granting the City's petition for

certiorari, counsel for Parmalee and Transfer "were asked to discuss the following jurisdictional questions: '1. Whether Parmalee Transportation Co. has standing to seek review here on appeal or by writ of certiorari. . . .'"

The entire Court felt that Parmalee could appeal (the dissenters did not argue this question and apparently likewise felt Parmalee could appeal), and the reasoning given is as follows:

> "Parmelee has standing to secure review of the judgment below by appeal. It is enough, for purposes of standing, that we have an actual controversy before us in which Parmelee has a direct and substantial personal interest in the outcome. Undoubtedly it is affected adversely by Transfer's operation. . . . It seems to us that Transfer's argument confuses the merits of the controversy with the standing of Parmelee to litigate them. . . ." (at p. 83).

Three other cases are of interest and importance, namely, *Consolidated Edison Company* v. *N. L. R. B.*, 305 U. S. 197; *International Union of Mine, Mill and Smelter Workers, Local No. 15* v. *Eagle-Picher Mining and Smelting Company*, 325 U. S. 335; and *Williams* v. *Morgan*, 111 U. S. 684.

In the *Consolidated Edison* case a C. I. O. affiliate filed a charge with the Labor Board that the Consolidated Edison Company was dominating an A. F. L. affiliate, and the Labor Board found that a Consolidated—Brotherhood (AFL) contract was invalid; the Board decided the Company had not committed an unfair labor practice but nevertheless required it to

cease and desist from giving the contract any effect. The Company petitioned the Circuit Court of Appeals to set aside the order, "and a petition for the same purpose was presented by the Brotherhood and its locals. These labor organizations had not been parties to the proceeding before the Board but intervened in the Court of Appeals as parties aggrieved by the invalidation of their contracts. . . . We issued writs of certiorari upon applications . . . of the Brotherhood and its locals" (at p. 218).

In the *International Union* case the Board's order directed back pay, and the employers sought review in the Circuit Court of Appeals. "The Unions, who are petitioners in this court, were permitted to intervene and were heard in support of the Board's order. . . ." (at p. 337). The Court decreed enforcement but, after nearly two years of checking and investigating, the Board felt that the original Court decree was somewhat in error because of the new facts disclosed during this two-year investigation; the Board thereupon petitioned the Court of Appeals to vacate a portion of its earlier order and remand for further consideration. The Unions again were permitted to intervene and to argue in support of the Board's petition. The Court dismissed the petition on its merits and the Board's petition for rehearing was denied, as was the Union's separate motion to modify the decree or vacate the paragraphs in question.

The employer's arguments in this Court contained the following point: "Petitioners are without capacity to prosecute an application for certiorari to review the ruling below upon the Board's petition. They were also without capacity to file the motion to

modify or remand the decree. The court below was without jurisdiction to entertain that motion. As a result petitioners cannot seek to review by certiorari the rulings criticized." The employer cited, amongst others, the *Amalgamated Utility* case, relied upon by all three Respondents herein.

This Court, at p. 338f., answered this contention as follows:

> "They also attack the standing of the petitioners to seek review by this court when the Board, the body charged with the enforcement of the National Labor Relations Act, has elected not to seek review. We think that, in the circumstances disclosed, the petitioners, though they could not have instituted enforcement proceedings, had standing to seek review of the order denying the Board's petition."

In a footnote to this last clause this Court cited the *Consolidated Edison* case and also *Williams* v. *Morgan, supra.* In the *Williams* case objection was made to the ability of Williams and one Thomson to appeal, and this was said to be dependent upon their right to intervene for the purpose of contesting the allowances to the Trustees. This Court upheld their right so to do, and the power of the court below so to permit, and stated:

> "We think that the position of Williams and Thomson made them *quasi* parties in the case and brought them within the reason of the former cases decided by this court in which persons incidentally interested in some branch of a cause have been allowed to intervene for the purpose

of protecting their interest, and even to come into this court or to be brought here on appeal, when a final decision of their right or claim has been made by the court below. . . ." (at p. 698f.).

C. Conclusions on the Cases

The unity of opposition amongst the three Respondents discloses that they all must stand or fall together.

The *Amalgamated Utility* case, *supra,* merely holds that a charging party cannot bring enforcement proceedings in the Court of Appeals. We agree and do not quarrel with this doctrine. But the other cases above cited and quoted, namely, the *Consolidated, International* and *Williams* cases, disclose that completely "external" persons actually did intervene in proceedings and then took certiorari into this Court. There was intervention *qua* intervention. In the instant proceedings there was no formal intervention, and Winzelberg, the Petitioner herein, never moved for this formal relief.

If the cases cited by all three Respondents are to be relied upon, then what should a charging party, seeking to preserve all his rights, be forced to do? Obviously, he must intervene, and do this formally.

The Board's Rules and Regulations, in the only section devoted to this, §102.29, speak of "Any person desiring to intervene . . . ."

But to this point in these Rules a charging party, as per the definitions and other sections quoted above, is already "in" as a party; what greater rights would intervention now give?

So, as already seen, Winzelberg did not have to move for relief which was redundant, superfluous, and unnecessary. He was already a party, not alone in fact but by yirtue of the statutory and Board prescriptions. He was not alone factually interested but financially so. He was the individual in whose favor a back pay order had been made; he was the individual who was financially interested in the outcome (not the Union, as in the *International Union* case on behalf of the employees directly); he was an actual, financial, and legal party to the proceedings from the very beginning.

But the *Williams* case permits Winzelberg to be denominated a "*quasi*-party," if that term may be utilized herein. Regardless, Winzelberg has standing herein.

If Winzelberg is denied this standing then what are the consequences in terms of charging individuals? They are parties, as above disclosed, but they cannot process anything; they must follow in the wake of the Board's efforts; and, finally, they cannot do aught into and through the enforcement stage. At what point can the party who initiated the proceedings, who stands to gain or lose by it, whose entire economic life is affected by it—at what point can such an individual be heard? It is submitted that in the type of situation found here it can only be as Winzelberg now claims, *via* a petition for this writ. If he had sought redress before this he could not have done anything; any other holding permits the Labor Board to act the part of a minor administrative lord, determining whether or not Winzelberg and others like him can seek review in this Court. This power is

one not granted it, which it should not have or seek indirectly to utilize, and which should be denied it by permitting this petition to lie.

It is respectfully urged that this procedural item is not on the merits, and that this Court may, nevertheless, decide against the Petitioner. All that is requested is the opportunity, in a democratic nation, to present a petition for redress, and this centuries-old procedure should not be denied one in the factual situation here disclosed.

III. Petitioner Has Standing in This Court and the Writ of Certiorari Should Be Granted

Respectfully submitted,

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